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SERVICE OF PROCESS ON NON-RESIDENT MOTORISTS

By THOMAS F. KONOP

Within the past five years statutes have been enacted in at least five states making effectual the service of process on a non-resident motorist in negligence actions by the appointment of an agent and mailing the process to the defendant. In a recent case of *State ex rel Cronkhite v. Belden,* Circuit Judge, 211 N. W. 916, the Supreme Court of Wisconsin sustained the constitutionality of Sec. 85.15 Sub. Sec. (3) Statutes of 1925 which provides:

> "The use and operation by a non-resident of a motor vehicle over the highways of Wisconsin shall be deemed an appointment by such non-resident of the secretary of state to be his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him, growing out of such use or operation resulting in damage or loss to person or property, and said use or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by serving a copy upon the secretary of state or by filing such copy in his office, together with a fee of two dollars, and such service shall be sufficient service upon the said non-resident; provided, that notice of such service and a copy of the process are within ten days thereafter sent by mail by the plaintiff to the defendant, at his last known address, and that the plaintiff's affidavit of compliance herewith is appended to the summons. The court in which the action is pending may order continuances as may be necessary to afford the defendant reasonable opportunity to defend the action, not exceeding ninety days from the date of the filing of the action in such court. The fee of two dollars paid by the plaintiff to the secretary of state at the time of the service shall be taxed in his costs if he prevails in the suit.

> **The secretary of state shall keep a record of all such processes which shall show the day and hour of service."**

This statute and the statutes of New Jersey, Connecticut and New Hampshire are substantially copies of a Massachusetts statute which was passed in 1923. The Supreme Judicial Court of Massachusetts sustained the validity of such statute in the case of *Pawloski v. Hess,* 144 N. E. 760; 35 A. L. R. 945. Following the Pawloski case the validity of the New Jersey statute was sustained by the Supreme Court of New Jersey in the case of *Martin v. Condon,* 129 Atl. 738 and by the Court of Errors and Appeals of New Jersey in the case of *Pizzutti v. Wuchter,* 134 Atl. 727. In the four cases there was only one dissent, by Eschweiler, J. of the Supreme Court of Wisconsin.

Before discussing the provisions of this statute a few general observations should be made on the necessity and requirements of sufficient service and on the nature and use of public highways.

Notice has always been considered as the life of a judicial proceeding. It is "the vital breath to animate judicial jurisdiction over the person." As was said in *Black v. Black,* 4 Bradf. 205, "A judicial determination of one's rights without notice would, indeed, be a mere mockery, a parrot-like mimickry of the forms of law." From the earliest times notice and opportunity to be heard in defense have been associated with jurisprudence. Fortescue, J., said: "The Laws of God and man give the party an opportunity to make a defense. I remember to have heard it observed by a very learned man upon such an occasion that even God Himself did not pass sentence upon Adam before he was called upon to make his defense;" and the same authority says that, "Natural Justice requires that every man shall be heard before he is condemned in judgment." The Magna Charta and our own constitutions speak out in emphatic terms that no man shall be deprived of life, liberty or property without notice and an opportunity to be heard. Our Supreme Court in *Baker v.* Baker, 61 L. Ed. 386, on page 392 said: "The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard (citing cases). To hold one bound by judgment who has not had such opportunity is contrary to the first principles of justice."

The Common Law requires personal service of process.

Personal service has always been favored in the law. Substituted service and constructive service are of statutory origin. Although substituted service is a less violent departure from personal service than constructive service by publication, strict compliance is always required in boh cases. Now quite generally statutes provide four ways of serving process:

First. Personal Service,—by reading the process to the defendant, or by delivering to and leaving with the defendant a true copy.

Second. Substituted Service,—by leaving a copy of the process at the last and usual place of abode.

Third. Constructive Service,—by publication.

Fourth. Statutes providing for personal service or process outside of the state, or by mailing the process to the defendant at his place of abode outside of the state; and providing that such service or mailing shall be equivalent to constructive service by publication.

Under the ways provided service can always readily be made on residents of the state. The first way is impossible on a non-resident if he is without the jurisdiction of the state. The second way is impossible on a non-resident as he has no place of abode in the state. The third and fourth ways alone, are now universally held to be ineffectual in a personal action.

Each state of course has the right to determine by what process and procedure rights may be adjudicated. But constitutional limitations cannot be violated. The process and procedure provided must afford reasonable notice and an opportunity to be heard. The boundaries of reasonable notice are now quite well defined.

Even before the frequently cited case of *Pennoyer v. Neff*, 95 U. S. 714 (1877), constructive service by public alone, in a personal action was held to be void. In that case it was held "that where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater

obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability."

Since this decision it has been and is now uniformly recognized that the only ways in which a court can acquire jurisdiction to render a personal judgment against a non-resident, is first, by voluntary appearance; second, by service of process on him while temporarily in the state; and third, if he has property in the state by bringing under the control of the court such property at the time of the commencement of the action by publication or its equivalent. This may be done by attachment, garnishment, injunction or any order which gives the court control over the property; and a personal judgment in the third way is limited to the value of such property.

The decision in *Pennoyer v. Neff* is based on the theory that when non-resident's property in the state is brought under the jurisdiction of the court at the commencement of the action, the defendant will in all probability be notified by his agent in charge of the property. The defendant is presumed to know that under the law, his property is subject to the laws of the state relating to title, transfer, assessment, taxation, etc. As was well said in *Huling v. Kaw Valley Ry. & Imp. Co.*, 130 U. S. 564; 9 Sup. Ct. Rep. 603; 32 L. Ed. 1045, "It is, therefore the duty of the owner of real estate who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases; it is his misfortune and he must abide by the consequences."

Pennoyer v. Neff is of course not applicable to actions in rem or actions affecting status such as divorce actions; but it has always applied to personal actions in tort or contract against non-residents, and any service which falls short of *Pennoyer v. Neff* has been uniformly held void.

Now as to the fourth way of service. It is uniformly held not only by the Supreme Court of the United States but by the state courts as well, that the court cannot acquire jurisdiction over a non-resident and render a valid judgment against him in a personal action, by a personal service of its process upon him outside of the state; or by mailing the process to him. In addi-

tion to such service or such mailing there must be some proceeding instituted to give the court control over the non-resident's property in the state.*

Now as to the nature of a public highway. As a rule the abutting property owners own the fee and the public has merely an easement of travel. This easement may be acquired by user, dedication or condemnation. In condemnation it is only the easement that is condemned. Unless the public highway is dedicated to some particular mode of travel, and this is rarely the case, the use of the public highway is open to all modes of travel. A public highway is a way in which all the people have a right to travel by all the usual modes of travel. At this late day it cannot be assumed and a court will not hold that travel by automobile is not the usual mode of travel. Is this right of travel limited to the citizens of the state? Truly not. It is open to all the public, to citizen, stranger and foreigner (29 C. J. 547). As was said in the case of *Hyde v. Minnesota* (S. D.) 136 N. W. 92, "He has whether an owner of the land or not, whether a citizen or a stranger, the right in common with the rest of the public, to travel all of the public highways."

True, the state in the exercise of its police power can regulate highways. But that too is subject to constitutional limitations. The state cannot discriminate against the non-resident in regulating its use. The right of a citizen to pass through a state is one guaranteed to him by the constitution. *Crandall v. Nevada,* 18 L. Ed. 745; *Ward v. Maryland,* 20 L. Ed. 449; *Welton v. Missouri,* 23 L. Ed. 347; Notes 14 L. R. A. 579.

Now in the light of the general principles above discussed let us revert to the provisions of the statute. In substance it provides that the use of a public highway in Wisconsin by a non-resident motorist shall be deemed the appointment of a state officer upon whom process may be served in a personal action for damages growing out of such use; and that by such use the non-resident motorist agrees that such service has the same force and validity as personal service. This is not made applicable to resident motorists. Can a state impose conditions upon non-residents that it does not impose upon residents when they use

* Notes, 16 L. R. A. 231-232; Notes, 50 L. R A., 577-582; Pennoyer v. Neff; Aikman v. Sanderson et al (La.), 47 So. 600; Baker v. Baker, etc. 61 L. Ed. 386; Flexner v. Farson, 109 N. E. 327; 63 L. Ed. 250.

the public highway on a par with residents which they have a perfect right to do? That is just what the above statute imposes. It is a discrimination pure and simple. If a non-resident has a right to enter the state to exercise his "privileges and immunities" as a citizen, how is he to enter unless it si over the public highway? The right of a non-resident to enter a state and transact business therein on a par with citizens of that state cannot be impaired or denied. No one can claim that requiring a higher auto-registration fee of a non-resident than that of a resident would not violate the "privileges and immunities" clause of the constitution. There is no authority that a public highway can be considered as the common property of a state as fish, game, public schools, etc., to warrant discrimination. As was said in the Slaughter House Cases, 21 L. Ed. 394, and repeatedly re-affirmed by the courts: "The sole purpose (of the "privileges and immunities" clause of the Constitution) was to declare to the several states that whatever those rights as you grant or establish them to your citizens, or as you limit or qualify, or impose restrictions on their exercise, the same neither more nor less, shall be the measure of the right of citizens of other states within your jurisdiction."

Undoubtedly the above provision is analogous to the provision requiring foreign corporations as a condition of doing business in the state to consent to the appointment of a state officer as one upon whom service of process may be made. But the courts have repeatedly held that corporations are not within the protection of the "Privileges and immunities" clause of the constitution; and that individuals are protected by that clause. The power of a legislature to appoint an agent in a state for a non-resident individual upon whom service of process may be made has been repeatedly repudiated.

The agency provided for in this statute is a novel one. It is created without defendant's consent and no provision is made for the agent thus appointed to notify the defendant. The agent plays no part in the serving of the process. As was well said by Eschweiler, J.; "Agency implies duties and obligations, but here his agency for such a non-resident is the merest shadow; he has absolutely no part to play in that which is essential in "due process," namely, the giving of notice to the one concerned." (211 N. W. 921). But even if the statute did provide that the

secretary mail a notice to the defendant, such mailing would, under the decisions, be ineffectual for any purpose.

The statute also provides that in addition to the service upon the state officer the plaintiff shall within ten days mail to the defendant at his last known address a notice of service on such officer and a copy of the summons with an affidavit of compliance. If personal service outside of the state without the court acquiring control over the defendant's property in the state, is void, then the mere mailing of a process to the last place of abode cannot be deemed service within the "due process" clause.

The case of *Aikmann v. Sanderson & Porter* (La.) 47 So. 600 was a tort action for causing death by negligence. It was held that residents of New York cannot be brought before the courts of Louisiana by a mailed citation and petition. Service by mail alone, outside of the state has been repeatedly held not to be due process of law.

The Wisconsin and New Jersey Courts cite with approval the Massachusetts case of *Pawloski v. Hess.* The decision in that case was based on the ground that it was an exercise of the police power. No one doubts that to promote safety the state has the power to regulate automobile traffic on its highways. It may regulate speed, turning, lighting, etc., and it may also require registration of non-resident motor vehicles and payment of fees for the building and repairr of highways to make them safe for driving. But, can the state by statute provide different regulations for the non-resident automobilist than it does for its own? Can it impose different restrictions on speed, lighting; or can it exact a higher registration fee? Clearly not. The non-resident has the same rights on the highways of the state as the resident. Can the usual requirements of "due process of law" be denied a non-resident because he uses what he has a right to use?

To justify its decision, the New Jersey Court in the Pizzutti case, 134 Atl. 727, on page 728 said this: "We think however that in the instant case there exists a feature not existing in the line of cases mentioned which differentiates the present case from the line of cases mentioned. This ground of differentiation is the power of the state of prohibit a non-resident from doing acts within the state dangerous to life and property, unless such

non-resident consents to the exercise of jurisdiction over him in our courts in causes of action growing out of the commission of such act within the state."

Does the non-resident motorist enter the state to do acts which are dangerous to life and property? Certainly not. Is the driving of an automobile on a public highway per se dangerous to life and property? It may have been considered such twenty-five years ago. But, today, when automobile traffic is the usual and practically the only traffic on our highways, a man cannot be considered little short of a criminal just because he drives an automobile on a public highway. Is the non-resident motorist less careful than our resident motorist so as to justify a discrimination against him and deny him the usual legal notice and opportunity to a hearing? It is hard to see how the use and operation of an automobile in a state by a non-resident can be made the basis of discrimination against him. It is still harder to understand how there can be any causal relation between the operation of an automobile and the manner of service of process in actions arising out of its use.

Much reliance is placed by the courts that have sustained the validity of these statutes upon two decisions of the Supreme Court of the United States; *Hendricks v. Maryland* (235 U. S. 610; 59 L. Ed. 385) and *Kane v. New Jersey,* (61 L. Ed. 222). Both cases were criminal cases and did not involve the question of sufficiency of service of process. Both were prosecutions for failure on the part of a non-resident motorist to register his car and pay the required registration fee which resident motorist were required to do. There was no discrimination against the non-resident.

Since the decisions in the Hendricks case and the Kane case, the Supreme Court of the United States decided the case of *Flexner v. Farson,* 63 L. Ed. 250. The facts were briefly these: Flexner brought suit in Kentucky against Farson, Son & Co., a partnership doing business in Kentucky but the members of which resided outside of Kentucky. In conformity to a Kentucky statute, service of process was made on the agent of the firm in charge of their business in Kentucky. Judgment was rendered against the firm. Action of debt was brought on the Kentucky judgment in Cook County, Illinois. The court re-

fused to give full faith and credit to the Kentucky judgment and judgment for the defendant was affirmed by the Supreme Court of Illinois. Upon error to the Supreme Court of Illinois, the Supreme Court of the United States affirmed the decision. *Flexner v. Farson,* 109 N. E. 327; 63 L. Ed. 250; *Aikman v. Sanderson et al.,* 47 So. 600.

In the case of *Baker v. Baker,* etc., 61 L. Ed. 386, where the aid of judgments in personam obtained in Tennessee was invoked in Kentucky, the court said, "But it is now too well settled to be opened to further dispute that the 'full faith and credit' clause and the acts of Congress passed pursuant to it do not entitle a judgment in personam to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound." The court on page 392 said further: *"And to assume that a party resident beyond the confines of the state is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a state beyond its own territory."*

In the light of these decisions, the Flexner Case, the Baker Case, what will be the decision of the Supreme Court of the United States when a case is presented involving the question of what credence is to be given to a personal judgment obtained upon service as provided in this statute under the "full faith and credit" clause of the constitution? Will that court sustain a service that falls far short of the requirements of *Pennoyer v. Neff?*